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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT S. MORGAN, Defendant and Appellant.	E045911 (Super.Ct.No. FVA800674) OPINION

APPEAL from the Superior Court of San Bernardino County. Stephan G. Saleson, Judge. Affirmed.

Stephen S. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

Originally charged with shooting at an inhabited dwelling in association with a criminal street gang (Pen. Code, §§ 246, 186.22, subd. (b)), defendant, Robert S. Morgan,

pled guilty to a lesser charge of being an accessory after the fact. (Pen. Code, § 32.) He was placed on probation with gang terms, and appeals, challenging the finding that a motor vehicle was involved, and several conditions of probation imposed pursuant to the plea agreement.

BACKGROUND

On April 9, 2008, four members of the Playboyz Party Crew (a criminal street gang) drove to a residence in Rialto in a black Dodge Charger. Victor Reyes, one of the occupants of the vehicle, was the current boyfriend of the victim's ex-girlfriend. Prior to driving to the location, Victor had discovered that the windows of his car and been broken out. Victor suspected the victim of committing this vandalism because he had received a phone call from the victim in which the victim told him "[t]hat's what you get." Victor picked up defendant Morgan and two others before driving to the victim's residence, where there was a verbal confrontation between Victor and the victim. Other vehicles arrived at the location and numerous members of the Playboyz Party Crew were outside their vehicles in front of the victim's residence. Fearing for his safety, the victim ran into the residence, where he heard several gunshots. After the shooting, Victor, the defendant, and the others ran back to the vehicle and left.

The victim called police and gave a description of the black Charger, which was spotted shortly thereafter and pulled over. The defendant, Victor, and two other gang members who occupied the vehicle, were identified by the victim during an in-field lineup, and were subsequently arrested.

A complaint was filed against the defendant and the three co-participants, charging them with shooting at an inhabited dwelling. (Pen. Code, § 246.) It was also alleged that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang. (Pen. Code, § 186.22, subd. (b)(1)(A).)

On the date of the preliminary hearing, the People amended the complaint to add a new count 2, charging defendant with being an accessory after the fact. (Pen. Code, § 32.) Waiving his right to a preliminary hearing, the defendant pled guilty to the amended charge pursuant to a plea agreement. The plea bargain provided that defendant would receive a grant of probation with gang terms, on condition he serve 90 days in custody on weekends. The agreement further provided that defendant would be released on his own recognizance immediately, subject to a "*Cruz* waiver."[1] The change of plea form included defendant's acknowledgment that his attorney had explained the consequences of the plea, an agreement that the court could consider the facts of any dismissed counts at sentencing (per *People v. Harvey* (1979) 25 Cal.3d 754), and a waiver of "any right to appeal from any motion I may have brought or could bring and from the conviction and judgment in my case since I am getting the benefit of my plea bargain."

At sentencing, defendant objected to several of the proposed probation conditions, namely, No. 14 (abstain from alcohol), No. 23 (curfew from 10 p.m. to 6 a.m.), No. 27

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[1] *People v. Cruz* (1988) 44 Cal.3d 1247. A "*Cruz* waiver" is one in which the defendant agrees that if he fails to appear at his sentencing hearing, the judge will not be bound by the plea bargain.

(stay away from schools), No. 29 (not appear at any court building unless a party), No. 30 (not possess any electronic pager or radio scanner), and No. 31 (not possess any aerosol paint containers, permanent markers or etching devices). Defendant also objected to the finding that a motor vehicle was involved in the offense. The court granted probation, struck term No. 14 (alcohol abstention), but imposed the remaining conditions because they were gang terms, "reflective of the plea agreement," and found that a motor vehicle was involved. Defendant filed a notice of appeal, challenging the sentence only.

DISCUSSION

Defendant argues that the trial court erred in finding that a motor vehicle was involved, and that imposition of the gang conditions was an abuse of discretion. We address these issues separately because different reviewing standards apply.

a. **There Is Substantial Evidence to Support the Motor Vehicle Finding**.

Defendant claims the court erred in finding that a motor vehicle was involved in the offense. He asserts the finding was not a gang term and not legally proper. Defendant is correct in asserting it is not a gang "term;" rather, it is a factual finding. When a finding of fact is attacked, we apply the substantial evidence standard of review. (*People v. Kortesmaki* (2007) 156 Cal.App.4th 922, 926.) This standard requires us to affirm if the evidence, viewed in the light most favorable to the judgment, could have led any rational trier of fact to make such a finding. (*Ibid.*, citing *People v. Martin* (2005) 127 Cal.App.4th 970, 975.)

Vehicle Code section 13350 requires the Department of Motor Vehicles (DMV) to revoke the privilege of a person to drive a motor vehicle upon receipt of a duly certified

abstract of the record of a court showing that the person has been convicted of a felony, in the commission of which a motor vehicle is used. (Veh. Code, § 13350, subd. (a)(2).) In the context of Vehicle Code section 13350, the Legislature intended the term "used in the commission of a felony" to mean that there was a nexus between the offense and the vehicle, not merely that a vehicle was incidental to the crime. Use of a vehicle to travel to and from the crime scene, and as a place from which to commit the crime has been held to satisfy the legislative intent. (*People v. Gimenez* (1995) 36 Cal.App.4th 1233, 1236.) In *In re Gaspar D.* (1994) 22 Cal.App.4th 166, the reviewing court held that a motor vehicle was "used" when the minor hid a stolen item in the trunk of his car. In *People v. Paulsen* (1989) 217 Cal.App.3d 1420, the defendant used her car to transport merchandise that had been purchased with fraudulent checks.

Defendant relies on *People v. Poindexter* (1989) 210 Cal.App.3d 803, in arguing that his use of the vehicle was merely incidental to the crime. We disagree. Use of the vehicles to transport numerous gang members was essential to intimidate the victim and could not have been accomplished on foot or bicycle where some gang members traveled a great distance.

Here, the record shows that multiple carloads of Playboyz Party Crew members traveled to the victim's residence in vehicles. The presence of many gang members was necessary to Victor's and the other gang members' purpose of intimidating the victim with a show of force. Without the vehicles, transportation of numerous gang members to the location of the crime would not have been possible. Particularly where defendant claims residence in Paramount, California, he could not have participated in the crime

without the use of the vehicle. We conclude that, although the gang members exited the vehicles before the gunshots were fired, and although defendant was a passenger and not a driver, the vehicle was "used" in the commission of the offense.

Additionally, given defendant's explanation that he needed his license to travel for his work program, we note that the appellate record was augmented to include the Rialto Police Department reports relating to the incident. The augmented record reveals defendant's driver's license was previously suspended, effective November 8, 2007 and was still suspended at the time of the crime. Defendant's assertions that he needed his license to drive from Los Angeles County to San Bernardino for his work release program are not well founded where his license was already suspended.

The act of the DMV in suspending or revoking a driver's license is merely an administrative act in performing a mandatory function, upon receipt of an abstract of judgment for qualifying convictions. (*Larsen v. Dept. of Motor Vehicles* (1995) 12 Cal.4th 278, 284, citing *Thomas v. Dept. of Motor Vehicles* (1970) 3 Cal.3d 335, 338.) The DMV's actions in this case flow from a judicial finding that a motor vehicle was involved, within the meaning of Vehicle Code section 13350, subdivision (a)(2), authorizing the DMV to perform the administrative act of suspension or revocation. Our review is limited to determining whether the finding is justified. We conclude there is substantial evidence to support the trial court's finding that a motor vehicle was involved in the commission of the crime.

b. **Defendant Forfeited Any Challenge to Imposition of the Gang Conditions, Which, In Any Event, Were Valid**.

Defendant challenges various probation conditions on the grounds they are not valid gang conditions. Respondent argues that defendant forfeited these challenges because (1) his plea agreement included a specific agreement to accept gang conditions requiring him to obtain a certificate of probable cause, and (2) he expressly waived his right to appeal from the judgment.

Respondent points to the fact defendant's initials on the plea form reflect his waiver of the right to appeal from "any motion I may have brought or could bring and from the conviction and judgment in my case since I am getting the benefit of my plea bargain," in asserting that because the defendant waived the right to appeal from the "judgment," he waived his right to appeal from alleged improper probation conditions. Judgment is rendered when the trial court orally pronounces sentence. (*People v. Ibanez* (1999) 76 Cal.App.4th 537, 543.) However, when the court grants probation after a conviction, and suspends imposition of sentence, no final judgment of conviction is rendered. (*People v. Arguello* (1963) 59 Cal.2d 475, 476.)

A grant of probation is qualitatively different from traditional forms of punishment; it is an act of clemency in lieu of punishment. (*People v. Mendoza* (2009) 171 Cal.App.4th 1142, 1150.) While an order granting probation is appealable (Pen. Code, § 1237, subd. (a)), probation is neither punishment nor a criminal judgment. (*People v. Mendoza, supra,* at pp. 1150, 1151, citing *People v. Howard* (1997) 16 Cal.4th 1081, 1092.) Since we strictly construe waivers, we conclude a waiver of the right to

appeal from the "judgment in my case" does not include a waiver of the right to appeal from an order granting probation.

However, we agree with respondent that by accepting "gang terms" as part of the plea agreement, his challenge to the probation conditions is a challenge to an integral part of the plea, requiring a certificate of probable cause to preserve any appellate challenge. While defendant argues that the term "gang terms" is devoid of specificity, and attempts to argue that they are not "gang terms," he did not present this argument in the trial court. He simply argued the probation conditions were not valid pursuant to *People v. Lent* (1975) 15 Cal.3d 481. The specific claim that the challenged conditions are not "gang terms" was thus forfeited. (*People v. Scott* (1994) 9 Cal.4th 331, 351-353.)

Contrary to defendant's assertion that the challenged conditions were not "gang terms," they have been routinely imposed as gang conditions, and routinely affirmed as proper conditions. (See *In re Laylah K.* (1991) 229 Cal.App.3d 1496, 1502 [curfew, alcohol, school, court appearances and association restrictions, disapproved on another ground in *In re Sade C.* (1996) 13 Cal.4th 952, 962]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 624, 625 [prohibitions against a variety of gang-related activities routinely upheld when imposed upon juveniles are also proper for adults].)

As routine gang conditions, the defendant expressly agreed to accept the challenged conditions as a term of his plea agreement. The gang terms were an integral part of the plea agreement, so any challenge to their validity constitutes a challenge to the validity of the plea agreement, requiring a certificate of probable cause. (*People v.*

Panizzon (1996) 13 Cal.4th 68, 76.) Lacking a certificate of probable cause, the issue is forfeited.

c. **On the Merits, Imposition of the Gang Conditions Was Not an Abuse of Discretion**.

Even if we were to reach the merits of defendant's claims, we would affirm. Defendant challenges the curfew restriction (No. 23), the condition prohibiting him from being on any school campus unless enrolled there or with prior permission from school authorities (No. 27), the condition prohibiting him from appearing in court unless he is a party or a witness (No. 29), the prohibition against possessing a pager or radio scanner unless required for employment (No. 30), and the prohibition against possessing aerosol paint containers, permanent markers or etching devices (No. 31). He claims that the gang terms are invalid because they (1) have no relationship to the crime of which he was convicted, (2) relate to conduct which is not in itself criminal, and (3) requires or forbids conduct that is not reasonably related to future criminality. (*People v. Lent, supra,* 15 Cal.3d at p. 486.) We disagree.

Probation is an act of clemency which rests within the discretion of the trial court, whose order granting or denying probation will not be disturbed on appeal unless there has been an abuse of discretion. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.) As pointed out in the previous section, conditions imposing a curfew, restricting a defendant from appearing in court unless he or she is a party or a witness, and restricting presence at schools have been upheld as valid gang conditions in prior published decisions. (*In re Laylah K., supra*, 229 Cal.App.3d at p. 1502; *People v.*

Lopez, supra, 66 Cal.App.4th at pp. 624, 625.) Schools and courthouses are "known gang gathering areas" and the restriction on court attendance is aimed at preventing the gathering of gang members to intimidate witnesses at court proceedings. (*In re Laylah K., supra*, at p. 1502.)

Regarding the conditions prohibiting possession of electronic scanners and pagers, conditions of probation requiring or forbidding conduct which is not in itself criminal may nonetheless be valid if they (1) have a relationship to the crime of which the offender was convicted, or (2) are reasonably related to future criminality. (*In re Vincent G.* (2008) 162 Cal.App.4th 238, 247.) Of course, probation conditions that infringe on the exercise of a constitutional right must be narrowly tailored. (*People v. Olguin* (2008) 45 Cal.4th 375, 384.) To the extent there may be a right to own a scanner or pager, the instant probation condition is narrowly tailored, where the probationer is still permitted to use cell phones and other electronic devices. Further, the condition is not an absolute prohibition as to scanners and pagers: to the contrary, there is an exception for employment related possession of the items.

Defendant acknowledges that scanners, beepers, aerosol paint containers, permanent markers, and etching devices have been linked to gang behavior. We observe that the primary object of possessing an electronic scanner is to ascertain the proximity of law enforcement vehicles. While pagers have become somewhat ubiquitous in today's society and have legitimate uses (see *In re Englebrecht* (1998) 67 Cal.App.4th 486, 496, 498), their common use by gangs is a proper area for probationary restriction. As for

aerosol paint containers, permanent markers, and etching devices, these items are directly related to gang graffiti and reasonably related to future criminality.

We are satisfied that the challenged probation conditions are valid terms geared toward the rehabilitation of the defendant. Thus, on the merits, the challenge fails.

DISPOSITION

The judgment is affirmed.

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s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/King
J.